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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 594

MARYLAND CASUALTY COMPANY,
Petitioner,

vs.

JOSEPH P. JACOBSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Maryland Casualty Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on September 2, 1964.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the District Court is unreported and is printed in the certified transcript in the

printed record below (R. 35-40). The opinion of the United States Court of Appeals for the Eighth Circuit is printed in Appendix A hereto, *infra*, p. A1, and is reported in ..... F.2d .....

JURISDICTION

The judgment of the Court of Appeals was entered on September 2, 1964, Appendix B, *infra*, page A8 an order staying issuance of the mandate of the Court of Appeals was entered on September 17, 1964, staying the mandate for a period of thirty days (30) from and after September 17, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether under Rule 56 Federal Rules of Civil Procedure the moving party for summary judgment must produce extraneous material to expose the adverse party's defense as unmerited when the adverse party rests upon the mere allegations of his pleadings?

2. Whether under Rule 56 Federal Rules of Civil Procedure by making cross-motions for summary judgment, both parties conceded that there was no material question of fact and that summary judgment should be entered?

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

The Federal Rule of Civil Procedure involved is Rule 56e and the pertinent text involved is:

". . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. . . ."

STATEMENT

The petitioner, Maryland Casualty Company, obtained a summary judgment in its favor in the District Court and the Court of Appeals set the judgment aside, reversed and remanded the case for further proceedings (A. 1-7).

Maryland was a surety and brought its complaint in the District Court for losses it suffered, as a surety, on certain indemnity agreements (R. 29) insuring performance of aerial photography contracts between the Joe Jacobson Flying Service and the United States Government A. 1). Jurisdiction was invoked because of diversity of citizenship and the controverted amount exceeded the statutory requirement (A. 1, R. 1).

Maryland filed a motion for summary judgment (R. 26) which was granted in part (R. 29, A. 3). Thereafter Jacobson filed a motion for summary judgment (R. 31, A. 3) which was overruled. The District Court then ordered the parties to agree to a reinstatement of Maryland's motion for summary judgment, or failing such agreement, ordering Maryland to file a new motion for summary judgment. Thereafter the District Court entered a judgment for Maryland (R. 39, A. 4). Jacobson then appealed the judgment (R. 40).

The Court of Appeals reversed because the record "fails to clearly reflect lack of a genuine issue of material fact" (A. 2).

The "genuine issue" for the Court of Appeals was the bare allegation of the purported affirmative defenses of defendant set out on his answer under paragraphs 15, 16, and 17, to the effect that the loss was Maryland's fault, that the defendant signed blank applications containing the indemnity agreements, and that defendant had no notice of the matter because he was absent from the United States (R. 4-5) or as the Court of Appeals put it:

> "the record is silent as to any *contravention* of Jacobson's averment of the affirmative defense with respect to liability under contract D. Under this bond, Jacobson *alleged* that Maryland's breach of agreement caused the loss. If Maryland was responsible for the loss, there could be no liability, . . ., and hence a factual issue was joined which in the record before us remains unresolved." (emphasis added A. 4-5)

The "factual issue" of course rested upon the mere allegations or denials of Jacobson's pleadings, his answer, and not upon any affidavits that set forth any specific facts showing a genuine issue for trial. Jacobson filed no affidavit supporting his contentions as to these affirmative defenses.

The Court of Appeals held that Maryland had to produce the "necessary extraneous material to expose this defense as unmerited" (A. 5), and not that Jacobson had any duty, other than pleading his defenses, because he could rest upon the mere allegations in his pleadings or as the Court of Appeals stated:

"the record is devoid of anything contravening Jacobson's allegations of affirmative defense" (A. 5).

The Court of Appeals held then that a party could defeat a summary judgment by merely resting on his pleadings because the Court of Appeals stated:

> "true, the moving party may pierce the counter allegations contained in his opponent's pleadings, but in order to do so, he must discharge his burden and show by extraneous material that there is no triable issue of fact although one superficially appears from the pleadings." (A. 5).

Rule 56e requires that "an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. . . ."

The summary judgment in Maryland's favor was set aside because Jacobson merely plead in his answer affirmative defenses.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in setting aside Maryland's summary judgment is in direct conflict with Rule 56e because Rule 56e requires that ". . . an adverse party may not rest upon the mere allegations or denials of his pleadings . . .". Jacobson only pled his affirmative defenses yet the Court of Appeals, ignoring Rule 56e, wrote a new rule that "It was not Jacobson's obligation, but Maryland's, to produce the necessary extraneous material to expose this defense as unmerited. (A. 5)." This in effect is a return to the old "Third Circuit Rule" that was in effect before the amendment of Rule

56e in 1963, that summary judgment could be defeated by the mere allegations of a party's pleadings. (See notes of Advisory Committee on Rules, Cumulative Annual Pocket Part, 1963, Title 23, Rule 56, p. 55, U.S.C.A.)

If such a holding prevails then Rule 56 is pointless and void in the Eighth Circuit and it virtually destroys the effect of summary judgment and puts a premium on dilatory tactics by specious denials or sham defenses. Rule 56 was a progressive reform in judicial procedure and an excellent device to break the log-jams in congested Court dockets but the Court of Appeals holding in this case nullifies this procedure.

2. The decision of the Court of Appeals below is in conflict with the decision of the Court of Appeals for the Second Circuit in the case of *Weyerhaeuser Company* v. *Gershman*, 324 F.2d 163 (1963), wherein the Second Circuit held that formal allegations in defendant's pleadings were insufficient to prevent entry of judgment. It would appear that the Court of Appeals below has returned to the old Third Circuit Rule that was condemned by the amendment to Rule 56e. The Court below by its ruling has emasculated Rule 56.

3. The decision of the Court of Appeals below is in conflict with the decision of the Court of Appeals of the District of Columbia Circuit in the case of *Dell Pub. Co.* v. *Summerfield*, D.C.D.C. (1961), 198 F. Supp. 843, affirmed 303 F.2d 766, wherein the District of Columbia Circuit held that by making cross-motions for summary judgment, both parties conceded that there was no material question of fact and that the matter should be determined as questions of law. The Court of Appeals below held that "the filing of cross-motions does not concede the absence of a triable issue of fact (A. 5)."

It would appear that by both parties filing motions for summary judgment both are admitting that there is no genuine issue as to any material fact. The conflict between the circuits should be resolved in favor of the view taken by the District of Columbia Circuit because it is a more effective utilization of the salutary device of summary judgment and prevents a party who has once moved for summary judgment, admitting no genuine issue of facts, coming back, as in the instant case, and claiming that there is such a genuine issue of fact. Such a procedure only further congests the dockets. Cross-motions for summary judgment should finally dispose of a case and not prolong it.

Settlement of this question by this Court is plainly in the public interest since the reason for Rule 56 is to relieve the congested court dockets.

This Court should not sanction such a destruction of Rule 56 as the Court below has done because its action clearly nullifies Rule 56 and is a far departure from the accepted and usual course of judicial proceedings under the Rule.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

NO. 17,321

Joseph P. Jacobson, Appellant, v. Maryland Casualty Company, Appellee.	Appeal from the United States District Court for the Western District of Missouri.

[September 2, 1964.]

Before VAN OOSTERHOUT, RIDGE and MEHAFFY, Circuit Judges.

MEHAFFY, Circuit Judge.

This appeal is from issuance of summary judgment favoring Maryland Casualty Company, appellee-plaintiff, in an action for losses allegedly suffered by Maryland, as surety, on certain indemnity agreements insuring performance of aerial photography contracts between the Joe Jacobson Flying Service and the United States Government.

Jurisdiction exists by reason of diversity of citizenship and controverted amount exceeding the statutory requirement.

We reverse on the inadequate record before us which fails to clearly reflect lack of a genuine issue of material fact.

The complaint alleged losses on bonds issued on applications therefor which were in effect contracts of indemnity, copies of which were subsequently designated in the record as Exhibits A, B, C, D and E. The complaint alleged losses on A, C, D and E and a credit on B. Jacobson signed application E as owner and signed A, B and C as indemnitor for Jacobson Flying Service, Carl C. Hughes, owner. Jacobson did not sign application D. Exhibits A, B and C were signed subsequent to the issuance of D, and E was signed by Jacobson as principal prior to execution of contract D.

On February 29, 1960, Maryland filed its request for admissions with the exhibits referred to above attached. On June 24, 1960, Jacobson answered this pleading admitting only that he had signed A, B and C in blank and that demand had been made on him but never in the amounts stated in plaintiff's request except for one item of $154.38, which represented an additional bond premium, not a loss, on Exhibit E.

On October 10, 1960, Maryland moved for summary judgment interlocutory in character under Rule 56 (c), Fed. R. Civ. P. Accompanying Maryland's motion was a "Suggestion in Support" containing authorities and asserting *inter alia* that no substantial issue of fact existed, inasmuch as Jacobson admitted signing Exhibits A, B, C and E, all containing clauses making the indemnitor liable for all "former and subsequent bonds", executed by the parties.

On February 16, 1961, Jacobson filed an amended answer which was a general denial, admitting only that his

signature appeared on Exhibits A, B and C. Jacobson also interposed an affirmative defense with respect to D alleging that the loss there was occasioned by Maryland's own fault in failing to timely provide Hughes its promised financial support to complete the principal contract. Further, Jacobson averred that he had no knowledge of the existence of D, unsigned by him in any capacity, and that he was in fact absent from the United States for months prior and subsequent to its issuance.

On March 29, 1961, the late Judge R. Jasper Smith considered Maryland's motion for summary judgment, granting its relief as to A, B and C, but denying its issuance as to D and E.[1]

Thereafter, on October 5, 1962, Jacobson filed a motion for summary judgment also accompanied by a "Suggestion in Support". Jacobson made no admissions in his motion but sought a favorable ruling as to liability on D which if granted would have reduced Maryland's claims to an amount below the jurisdictional requirement.

On December 14, 1962, Judge Oliver decided the case on Jacobson's motion for summary judgment by deny-

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1. As to Exhibit D, he ruled:

"It is also plaintiff's position that summary judgment on the issue of liability should be given in its favor as to bond number 684627. Defendant did not sign the application for this bond, but plaintiff contends that defendant is liable, nevertheless, because of certain agreements contained in the other bonds which defendant admittedly signed. It is not necessary to recite the agreements contained in these other bonds. It is enough to say that as to this theory of liability, plaintiff has not sustained its burden of showing that a factual issue does not exist, or that it is legally entitled to recover. A party requesting summary judgment does not discharge his burden of proof by a simple claim for relief. It must be supported, under our rules, by adequate suggestions demonstrating affirmatively that he is entitled to the relief sought. This has not been done in this instance."

ing same, while ordering the parties to agree to a reinstatement of Maryland's motion for summary judgment, or failing such agreement, ordering Maryland to file a new motion for summary judgment as well as a precedent for formal order directing entry of judgment for plaintiff. The record next indicates that on December 26, 1962, the trial court entered judgment for Maryland in the full amount sued for with interest from July 1, 1957, plus attorney's fees.

The mission of summary judgment is to allow the trial judge to dispose of a case in advance of a hearing on the merits, when the pleadings, depositions, answers to interrogatories, and admissions on file, together with any supporting affidavits, reveal that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), Fed. R. Civ. P. Since the remedy is extreme and not to be used as a substitute for trial, any doubt as to the existence of a triable issue of material fact must be resolved against the party moving for summary judgment. *United States* v. *Farmers Mut. Ins. Ass'n. of Kiron, Iowa*, 288 F.2d 560 (8th Cir. 1961), and cases there cited; *Elbow Lake Coop. Grain Co.* v. *Commodity Credit Corp.*, 251 F.2d 633 (8th Cir. 1958).

Maryland had the burden of clearly establishing the lack of genuine issue of material fact. See *Walling* v. *Fairmont Creamery Co.*, 139 F.2d 318 (8th Cir. 1943) and the cases collected in *Allied Mutual Ins. Co.* v. *Lysne*, 324 F.2d 290, 293 (8th Cir. 1963). Maryland's burden cannot be discharged unless the record upon which it moved reflected beyond question the lack of a genuine issue of material fact. The record falls short in this regard. The record is silent as to any contravention of Jacobson's averment of the affirmative defense with

respect to liability under contract D. Under this bond, Jacobson alleged that Maryland's breach of agreement caused the loss. If Maryland was responsible for the loss, there could be no liability upon the principal, Hughes, and hence a factual issue was joined which in the record before us remains unresolved.

Maryland maintained that the cross-motions for summary judgment constituted a concession by both parties that no material question of fact existed, but the issues raised should be determined as questions of law. Maryland further asserts that Jacobson admitted all the facts now claimed but we fail to find any admissions in his motion. Even if Jacobson made such admissions, they were made for the purpose of his motion only. The filing of cross-motions does not concede the absence of a triable issue of fact. The court is bound in such cases to deny both motions if it finds, as here, there is actually a genuine issue of material fact. See *Allied Mutual Ins. Co.* v. *Lysne, supra.*

Maryland also contends that the assertions made in support of its motion must be taken as true but makes no counter assertions with respect to Jacobson's affirmative defense. The assertions in the motion are meaningless unless supported as provided for in Rule 56(e). True, the moving party may pierce the counter allegations contained in his opponent's pleadings, but in order to do so, he must discharge his burden and show by extraneous material that there is no triable issue of fact although one superficially appears from the pleadings. The record is devoid of anything contravening Jacobson's allegation of affirmative defense. It was not Jacobson's obligation, but Maryland's, to produce the necessary extraneous material to expose this defense as unmerited.

Maryland makes mention in its brief that there were three pretrial orders, one of which contained the statement that the parties are in agreement that there may be no genuine issues to various material facts controlling the ultimate disposition of this case. Judge Oliver in his memorandum and order of December 14, 1962, states that since Judge Smith's order, the factual questions have been resolved.[2] The court's memorandum also speaks of Jacobson's "complete knowledge of and admitted interest in the performance of the contracts . . .". The record before us, however, contains none of the pretrial orders or any other official action taken in the case since the original order except the filing of Jacobson's motion for summary judgment. As we have pointed out, the record is lacking in anything that would justify a summary disposition of the entire case. This Court observed in *Kash Industries, Inc.* v. *Petersen Mfg. Co.*, 332 F.2d 1002 (8th Cir. 1964), that when the record is so inadequate, incomplete and insufficient, we cannot consider or determine the validity of the District Court's conclusions or whether the contentions of the appellee have any merit. We might surmise from the statements in Maryland's brief and the court's memorandum that Jacobson might likely have

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2. "Since Judge Smith's order the factual questions have, as a practical matter, been resolved. The most that defendant has ever indicated that might present any genuine issue of fact would be a possible contention that in regard to Exhibit D there might be testimony that defendant may have signed that application in blank. Defendant's complete knowledge of and admitted interest in the performance of the contracts bonded reduces that possible factual circumstance to a question of law. "Even if defendant should give such testimony, that testimony would not establish any defense to plaintiff's claim. See *Pacific Indemnity Company* v. *Wyrembek*, D.C. Wisc., 1960, 183 F.Supp. 252, 254. We know of no material facts that are in dispute, particularly when consideration is given to what has occurred since our pre-trial order of September 13, 1962."

failed to prevail, but this does not justify the trial court in refusing him his day in court, particularly on the issue of his affirmative defense, as well as on any other issue not shown by the record to be a sham, frivolous or so unsubstantial that a trial would obviously be futile. *United Pacific Ins. Co.* v. *United States,* 296 F.2d 160 (8th Cir. 1961); *Sprague* v. *Vogt,* 150 F.2d 795, 801 (8th Cir. 1945).

The trial court very properly undertook to terminate fairly a long pending litigation, but the record here clearly does not justify summary judgment as a proper vehicle for that desirable conclusion. For the reasons stated, the order of the District Court is set aside and the case is remanded for further proceedings.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

(Judgment)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

NO. 17,321

SEPTEMBER TERM, 1963

Joseph P. Jacobson, Appellant, v. Maryland Casualty Company.	Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court appealed from be, and the same is hereby, set aside.

It is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court for further proceedings not inconsistent with the Opinion of this Court this day filed herein.

And it is further Ordered by this Court that Joseph P. Jacobson have and recover against Maryland Casualty Company the sum of Three Hundred Seventy-six and 62/100 Dollars for his costs in this behalf expended, and have execution therefor.

September 2, 1964.